



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XB270]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Elkhorn Slough Tidal Marsh Restoration Project, Phase III in Monterey County, California

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; proposed issuance of an incidental harassment authorization; request for comments.

SUMMARY: NMFS has received a request from the California Department of Fish and Wildlife (CDFW) for authorization to take marine mammals incidental to the Elkhorn slough Tidal Marsh Restoration Project (Phase III) in Monterey County, CA. which includes the excavation and movement of soil with heavy machinery for marsh restoration. NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS is also requesting comments on a possible one-time, one-year renewal that could be issued under certain circumstances and if all requirements are met, as described in **Request for Public Comments** at the end of this notice. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorizations and agency responses will be summarized in the final notice of our decision.

DATES: Comments and information must be received no later than **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Written comments should be submitted via email to *ITP.Corcoran@noaa.gov*.

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments, including all attachments, must not exceed a 25-megabyte file size. Attachments to comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act> without change. All personal identifying information (*e.g.*, name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Kim Corcoran, Office of Protected Resources, NMFS, (301) 427-8401. Electronic copies of the original application and supporting documents (including NMFS FR notices of the prior authorizations), as well as a list of the references cited in this document, may be obtained online at:

<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>. In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in

a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other “means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to in shorthand as “mitigation”); and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216-6A, NMFS must review our proposed action (*i.e.*, the issuance of an IHA) with respect to potential impacts on the human environment.

The current action is consistent with categories of activities identified in Categorical Exclusion B4 (incidental harassment authorizations with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified

any extraordinary circumstances that would preclude this categorical exclusion.

Accordingly, NMFS has preliminarily determined that the issuance of the proposed renewal qualifies to be categorically excluded from further NEPA review just as the initial IHA did.

We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

Summary of Request

On June 14, 2021, NMFS received a request from CDFW for an IHA to take marine mammals incidental to the Elkhorn Slough Restoration Project, Phase III, at the Seal Bend Restoration Area in Monterey County, CA. The application was deemed adequate and complete on July 27, 2021. CDFW's request is for take of a small number of Pacific harbor seals (*Phoca vitulina*) by Level B harassment only. Neither CDFW nor NMFS expects serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

NMFS previously issued an IHA to CDFW for Phase I (82 FR 16800; April 6, 2017) and Phase II (85 FR 14640; March 13, 2020) of the Elkhorn Slough Restoration Project. Restoration work under the 2020 IHA at the Minhoto-Hester and Seal Bend restoration areas was expected to be completed within 180 days within the one-year timeframe of the IHA. However, on May 3, 2021 CDFW informed NMFS that the estimated 180 days of construction for both the Minhoto-Hester and Seal Bend Restoration Areas would not be enough to complete the project. This preliminary estimate did not adequately account for variable weather conditions experienced during construction (*e.g.*, wet weather and soils required extensive reworking of fill), the amount of time to haul material from the borrow area to the fill location, or contractor availability which resulted in a smaller crew than initially expected. Therefore, only 118 days of construction occurred under the initial IHA. To cover the remaining work at the Minhoto-

Hester Restoration Area, CDFW requested an IHA Renewal. NMFS published a notice of a proposed IHA Renewal and request for comments in the **Federal Register** on June 8, 2021 to complete the remaining 62 days of work (86 FR 30412; June 8, 2021) (Hereafter referred to as the 2021 Renewal). We subsequently published the final notice of our issuance of the IHA Renewal on July 7, 2021 (86 FR 35751).

As work at the Seal Bend Restoration Area had not begun and could not be covered by the IHA Renewal, CDFW requested that a new IHA be issued that would be valid for one year from the date of issuance. Under this proposed IHA, CDFW would conduct 240 days of work to restore 28.6 acres (11.57 hectares) of tidal marsh habitat in the Seal Bend Restoration Area. The project would include the use of haul trucks and heavy earthmoving equipment to transport dry material out onto the marsh. The proposed project activities will not differ from the 2020 IHA other than the number of construction days, and the means of calculating take.

Description of the Proposed Activity

Overview

Over the past 150 years, human activities have altered the tidal, freshwater, and sediment processes, which are essential to support and sustain Elkhorn Slough's estuarine habitats. In response to years of anthropogenic degradation (*e.g.*, diking and marsh draining), the Elkhorn Slough Tidal Marsh Restoration Project (project) plans to restore approximately 122 acres (49.37 hectares) of tidal marsh across three phases, all of which are located in Monterey County, California (Figure 1). Phase I of the project, completed in 2018, restored 61 acres (24.69 hectares) of tidal marsh within the Minhoto-Hester Marsh in Elkhorn Slough (Monterey, CA) (Figure 2) (82 FR 16800; April 06, 2017) (Hereafter referred to as the 2017 IHA). Phase II of the project, planned for completion in September 2021, plans to restore 29.4 acres (11.90 hectares) of tidal marsh at the Minhoto-Hester Restoration Area adjacent to the Phase I Restoration Area (see Figure 2).

As the remainder of the work associated with the project has not been completed and could not be covered by the 2021 Renewal, CDFW requests that this proposed IHA cover take incidental to Phase III of the project, which will restore 28.6 acres (11.57 hectares) at the Seal Bend Restoration Area shown in Figure 2. Similar to previous projects, Phase III will relocate soil from an upland area called “the borrow” through use of heavy earth moving equipment, within a 12 month period. Construction activities are expected to produce airborne noise and visual disturbance that have the potential to result in behavioral harassment of Pacific harbor seals (*Phoca vitulina*). NMFS is proposing to authorize take, by Level B Harassment, of Pacific harbor seals as a result of the specified activity. To support public review and comment on the IHA that NMFS is proposing to issue here, we refer to the documents related to the previously issued IHA and discuss any new or changed information here. The previous documents include the **Federal Register** notice of the issuance of the 2020 IHA (85 FR 14640; March 13, 2020), the **Federal Register** notice of the issuance of the 2021 IHA Renewal (86 FR 35751; July 7, 2021), and all associated references and documents. We also refer the reader to CDFW’s previous and current applications and monitoring reports which can be found at <https://www.fisheries.noaa.gov/node/23111>.

Dates and Duration

As previously mentioned, the Phase II IHA covered restoration work at both the Minhoto-Hester Restoration Area and the Seal Bend Restoration Area for 180 total days of construction but the work was not able to be completed for both locations within the timeframe and take estimate constraints of the 2020 IHA and 2021 Renewal IHA for the reasons discussed above. Therefore, CDFW is requesting this new authorization for 240 construction days to account for similar, anticipated construction constraints at the Seal Bend Restoration Area, such as likely wet weather, the distance between the borrow area and restoration site, and limited contractor availability. CDFW is prepared to start the

work at Seal Bend as soon as they receive authorization, so this IHA will be valid for one year from the date of issuance.

Specific Geographic Region

The project is located in the Elkhorn Slough estuary, about 90 miles south of San Francisco and 20 miles north of Monterey in Monterey County, California (Figure 1).

The project sites are located on land owned and operated by CDFW as part of the Elkhorn Slough Ecological and National Estuarine Research Reserves. The waters of the Elkhorn Slough State Marine Reserve and Monterey Bay National Marine Sanctuary run north of the Phase III project site in Elkhorn Slough's main channel. Two additional Marine Protected Areas are located within approximately one mile of the project site: Elkhorn Slough State Marine Conservation Area and Moro Cojo Slough State Marine Reserve.

Phase III would restore the Seal Bend Restoration Area which includes about 28.6 acres (11.57 hectares) of historic farmland adjacent to Elkhorn Slough and west of the Phase I and II restoration areas (Figure 2). The proposed project area is low-lying area consisting of subsided pickleweed (*Salicornia*) marsh, intertidal mudflats, and tidal channels. Fill material for Seal Bend will be obtained from a 38 acre (15.38 hectare) upland borrow area south of the Minhoto-Hester (Phase II) Restoration Area (Figure 2). Once complete, the slopes of the borrow area would be graded to increase marsh area and create a gently sloping ecotone band along the edge of the Phase I and II sites.

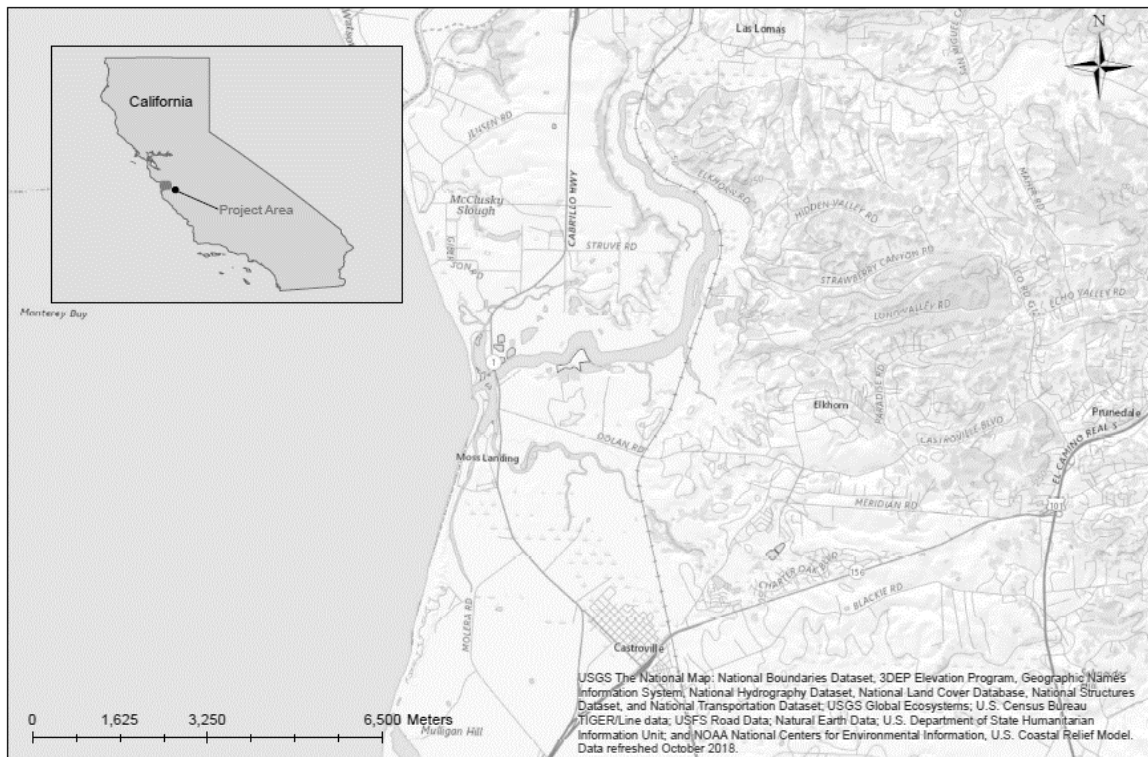


Figure 1. Location of the proposed restoration project in Monterey County, California.



Figure 2. Map depicting the location of each restoration site for the project for the proposed and previous phases

Detailed Description of Specific Activity

As previously described, the proposed project would restore 28.6 acres (11.57 hectares) of tidal marsh habitat at the Seal Bend Restoration Area. As described in more detail in the 2020 IHA, project components to restore hydrologic function to the project area would include raising the subsided marsh plain, maintaining or re-excavating existing tidal channels, and restoring marsh plain, ecotone, and native grassland habitat within a borrow/upland buffer area.

Up to 133,346 cubic yards (CY) (101950.33 cubic meters (CM)) of soil will be obtained from the upland borrow area to raise the subsided marsh plain to an average of 1.9 feet (0.58 m) above the current height. This target elevation would allow emergent wetland vegetation to naturally be reestablished. Sediment would be placed to a fill elevation slightly higher than the target marsh plain elevation to allow for settlement and consolidation of the underlying soils. After construction is complete, the project would rely primarily on natural vegetation recruitment in the restored marsh areas.

An additional detailed description of the proposed restoration project is found in the proposed and issued 2020 IHA. The location and nature of the activities, including the types of equipment planned for use, are identical to those described in the previous notices. Differences between the 2020 IHA and the proposed 2021-2022 IHA occur in the number of days restoration work would occur, the method for calculating take, and visual monitoring requirements, all of which are discussed in detail below.

Description of Marine Mammals in the Area of Specified Activities

A description of the marine mammals in the area of the activities is found in the 2020 IHA, which remains applicable to the proposed 2021-2022 IHA as well. In addition, NMFS has reviewed recent 2020 Stock Assessment Reports, information on relevant Unusual Mortality Events, and recent scientific literature, and determined that no new information affects our original analysis of impacts under this proposed IHA.

Potential Effects of Specified Activities on Marine Mammals and their Habitat

A description of the potential effects of the specified activities on marine mammals and their habitat may be found in the documents supporting the 2020 IHA, which remains applicable to the issuance of the proposed 2021-2022 IHA. There is no new information on potential effects.

Estimated Take

A detailed description of the previous methods and inputs used to estimate authorized take is found in the 2020 IHA. The total number of construction days and the method of estimating take have been modified from the 2020 IHA to reflect construction delays as discussed above and the monitoring data received under the 2020 IHA. The source levels and marine mammal occurrence and density remain unchanged from the 2020 IHA and detailed information regarding these figures can be found in the proposed and issued 2020 IHA.

Take Calculation and Estimates

To repeat how take was calculated in the 2020 IHA, we used the total number of seals taken during Phase I construction (*i.e.*, 62 seals) divided by the sum of the daily average number of seals observed hourly during Phase I. That percentage (8.79 percent) was rounded to 9 percent and multiplied by the sum of the highest daily count of seals observed by the Reserve Otter Monitoring Projects at all observation areas between January 2018 and April 2019 (*i.e.*, 417). That number was multiplied by the total number of construction days to arrive at the total take estimate that was used.

For the Phase III project, we have additional monitoring data that more accurately reflects the amount of take that occurs during this type of restoration activity. In particular we now have data that suggests the maximum number of seals taken per day within 300 m of construction activity has been 8, which occurred on September 8, 2020 (Table 1). Therefore, we propose to use that maximum number of seals taken per day to

estimate take using the following formula:

$$\text{Total Take Estimate} = \text{Max \# of seals taken per day} * \text{\# of Construction Days}$$

The average total individual takes per day for Phase II was 1.33 which is considerably lower than the proposed maximum number of seals taken per day (8) (Table 1). Therefore we believe this approach is adequately precautionary and reflects likely expected take. Using this approach, a summary of estimated takes of harbor seals incidental to the proposed project activities are provided in Table 2.

Table 1. Phase II Harbor Seal Disturbance Data – Number of Seals Experiencing Level B Harassment

Date	Distance (m)	Total Individuals Harassed ¹
9/2/2020	300m	0
9/8/2020	150m	0
9/8/2020	150m	0
9/9/2020	60m	0
9/10/2020	60m	0
9/15/2020	60m	1
9/21/2020	60m	0
9/21/2020	60m	2
11/9/2020	300m	1
3/17/2021	200m	5
3/24/2021	60m	1
3/24/2021	60m	1
4/5/2021	80m	2
4/5/2021	60m	1
4/14/2021	80m	2
9/2/2020	60m	0
9/3/2020	20m	1
9/8/2020	80m	8
9/9/2020	40m	0
9/16/2020	100m	1
9/22/2020	40m	0
10/19/2020	40m	2
10/28/2020	100m	0
11/5/2020	60m	0
12/3/2020	80m	1
12/16/2020	60m	7
5/4/2021	80m	0
Total		36

¹ “Total Seals Taken” = the number of seals that moved or flushed during the incident. Alert responses are not considered to be takes.

Table 2. Calculated and Proposed Take and Percentage of Stock Exposed

	Authorized Take		
Species	Level B	Level A	Percent of Stock ³
Pacific Harbor Seal	8 max seals taken per day ¹ *(240 days ²)= 1920	0	6.2
¹ . Maximum number of seals harassed/taken in one day during Phase II ² . Number of construction days at the Seal Bend Restoration Area. ³ . Data from U.S. Pacific Marine Mammal Stock Assessments: 2014 (Carretta <i>et al.</i> , 2015) (Abundance = 30,968)			

Proposed Mitigation, Monitoring and Reporting Measures

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that

the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned); and

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

Description of Proposed Mitigation

Some of the proposed mitigation measures are identical to those included in the **Federal Register** notification announcing the final 2020 IHA and detailed descriptions of these requirements can be found in that document. However, a few requirements have been updated to reflect NMFS more recent construction requirements and those changes are discussed in detail below and proposed for this project:

Visual Monitoring—CDFW must fulfill monitoring requirements as described below. Required monitoring must be conducted by dedicated, trained, NMFS-approved Protected Species Observer(s) (PSO(s)). CDFW must monitor the project area to the maximum extent possible based on the required number of PSOs, required monitoring locations, and environmental conditions.

- Level B Harassment Zone – PSOs shall establish a Level B harassment zone within 300 m of all construction activities.
- When construction activities occur either, (1) in water or; (2) within the boundaries of the Seal Bend Restoration Area (Phase III) identified in Figure 2, monitoring must occur every other day when work is occurring.
- When construction activities occur near the “borrow” area where marsh fill material is gathered, monitoring must occur every fifth day when work is occurring within 300 m from seal haulouts or, if outside this area, when work is occurring less than

200 m from the water. Occurrence of marine mammals within the Level B harassment zone must be communicated to the construction lead to prepare for the potential shutdown when required.

Description of Proposed Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.*, presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.*, source characterization, propagation, ambient noise); (2) affected species (*e.g.*, life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.*, age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;

- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.*, marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and
- Mitigation and monitoring effectiveness.

Changes from the 2020 IHA include:

- 5(g)(v)(10): Notes should include any of the following information to the extent it is feasible to record:
 - Age-class;
 - Sex;
 - Unusual activity or signs of stress;
 - Activity of seals observed within hour timeframe (*e.g.*, resting, swimming, etc.) and approximate number of seals that have arrived or left since last hourly count;
 and
 - Any other information worth noting;
- 6(a): The Holder must submit its draft report(s) on all monitoring conducted under this IHA within 90 calendar days of the completion of monitoring or 60 calendar days prior to the requested issuance of any subsequent IHA for construction activity at the same location, whichever comes first. A final report must be prepared and submitted within 30 calendar days following receipt of any NMFS comments on the draft report. If no comments are received from NMFS within 30 calendar days of receipt of the draft report, the report shall be considered final.

The rest of proposed monitoring and reporting measures are identical to those included in the FR Notice announcing the final 2020 IHA and detailed descriptions of these requirements can be found in that document.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.*, population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be “taken” through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.*, intensity, duration), the context of any responses (*e.g.*, critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS’s implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.*, as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

Construction activities associated with this project have the potential to disturb or displace marine mammals. No serious injury or mortality is expected, and with mitigation we expect to avoid any potential for Level A Harassment as a result of the Seal Bend construction activities for Phase III. The specified activities may result in take, in the form of Level B harassment (behavioral disturbance) only, from visual disturbance and/or noise from construction activities. The project area is within a portion of the local, year round, habitat for harbor seals of the greater Elkhorn Slough. Behavioral disturbance associated with these activities are expected to affect only a small amount of the total population, although those effects could be recurring over the life of the project if the

same individuals remain in the project vicinity. Harbor seals may avoid the area or halt any behaviors (*e.g.*, resting) when exposed to anthropogenic noise or visual disturbance. Due to the abundance of suitable and, in some cases, newly restored haulout habitat available in the greater Elkhorn Slough, the short-term displacement of resting harbor seals is not expected to affect the overall fitness of any individual animal.

Effects on individuals that are taken by Level B Harassment, on the basis of reports in the literature as well as monitoring from previous phases and other similar activities, will likely be limited to reactions such as displacement from the area or disturbance during resting. The construction activities analyzed here, such as equipment used, construction approach, and turbidity management, are the same as those activities previously analyzed under the 2017 and 2020 IHAs. Both Phase I and Phase II of the project reported no injuries or mortality to marine mammals as a result of the construction activities, and no known long-term adverse consequences from behavioral harassment have been documented. Repeated exposures of individuals to levels of noise or visual disturbance at these levels, though they may cause Level B Harassment, are unlikely to result in hearing impairment or significant disruption of foraging behaviors. Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (*i.e.*, 24 hour cycle), and behavioral reactions (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.*, 2007). However, Pacific harbor seals have been hauling out at Elkhorn slough for several years (including during pupping season and while females are pregnant), despite the presence of anthropogenic noise and activities such as vessel traffic, Union Pacific Railroad (UPRR) trains, and human voices from kayaking and recreational activities. Harbor seals have repeatedly hauled out to rest (inside and outside the project area) or pup (outside of the project area) despite these potential stressors. The activities are not

expected to result in the alteration of reproductive or feeding behaviors. It is not likely that neonates will be in the project area as females prefer to keep their pups along the main channel of Elkhorn Slough, which is outside the area expected to be restored by project activities (Figure 2). Seals are primarily foraging outside of Elkhorn Slough and at night in Monterey Bay, outside the project area, and during times when construction activities are not occurring.

Pacific harbor seals, as the only potentially affected marine mammal species under NMFS jurisdiction in the action area, are not listed as threatened or endangered under the ESA and NMFS SARs for this stock has shown to be increasing in population size and is considered stable (Caretta *et al.*, 2015). Even repeated Level B Harassment of some small subset of the overall stock is unlikely to result in any significant decrease in viability for the affected individuals, and thus will not result in any adverse impacts to the stock as a whole. The restoration of the marsh habitat will have no adverse effect on marine mammal habitat, but possibly a long-term beneficial effect on harbor seals by improving ecological function of the slough, including higher species diversity, increase species abundance, larger fish, and improved habitat.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No mortality is anticipated or authorized;
- No Level A Harassment is anticipated or authorized;
- Anticipated incidents of Level B Harassment consist of, at worst, temporary modifications in behavior;
- Primary foraging and reproductive habitat are outside of the project area and not expected to result in the alteration of habitat important to these behaviors or

substantially impact the behaviors themselves. There is alternative haulout habitat just outside the footprint of the construction area, along the main channel of Elkhorn Slough, and in Parson's Slough, often the preferred pupping grounds in recent years (per comm Jim Harvey 2019), that will be available for seals while some of the haulouts are inaccessible;

- Restoration of the marsh habitat will have no adverse effect on marine mammal habitat, but possibly a long-term beneficial effect;
- Presumed efficacy of the mitigation measures in reducing the effects of the specified activity to the level of least practicable impact; and
- These stocks are not listed under the ESA or considered depleted under the MMPA.

In combination, we believe that these factors, as well as the available body of evidence from previous phases of the project and other similar activities, demonstrate that the potential effects of the specified activities will have only short-term effects on a relatively small portion of the entire California stock. The specified activities are not expected to impact rates of recruitment or survival and will therefore not result in population-level impacts.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where

estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

For the proposed Phase III of the Elkhorn Slough Tidal Marsh Restoration Project, the authorized take (if we conservatively assume that each take occurred to a new animal, which is unlikely) comprises approximately 6.2 percent of the abundance of Pacific harbor seals in the California Stock. Therefore, based on the analysis herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stock.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stock or species implicated by this action. Therefore NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act (ESA)

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16. U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated

critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity in the Elkhorn Slough Reserve. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to CDFW for conducting restoration activities at the Seal Bend Restoration Area in Elkhorn Slough (Monterey County, CA) for 12 months from the date of issuance, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at

<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>.

Request for Public Comments

We request comment on our analyses (included in both this document and the referenced documents supporting the prior IHAs), the proposed authorization, and any other aspect of this Notice of Proposed IHA for the proposed Elkhorn Slough Tidal Marsh Restoration Project, Phase III, in Monterey County, CA. We also request at this time comment on the potential for renewal of this proposed IHA as described in the paragraph below. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

On a case-by-case basis, NMFS may issue a one-time, one-year Renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical or nearly identical, or nearly identical, activities as described in the *Detailed Description of Specific Activity* section of this notice is planned

or (2) the activities as described in the *Detailed Description of Specific Activity* section of this notice would not be completed by the time the IHA expires and a Renewal would allow for completion of the activities beyond that described in the *Dates and Duration* section of this notice, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to the needed Renewal IHA effective date (recognizing that the Renewal IHA expiration date cannot extend beyond one year from expiration of the initial IHA);

- The request for renewal must include the following:

- (1) An explanation that the activities to be conducted under the requested Renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.*, reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take); and

- (2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized; and

- Upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

Dated: August 2, 2021.

Catherine Marzin,

Director, Office of Protected Resources,

National Marine Fisheries Service.